

To: All Commissioners

From: Caryn J. Holmes
Staff Counsel IV

Subject: Rebuttal Testimony for August 24, 2005 Commission Hearing on IOU
Appeals of Executive Director's Aggregation Proposal

Date: August 12, 2005

Pursuant to the Energy Commission's July 22, 2005 Notice Regarding August 24 2005 Hearing, attached please find the Rebuttal Testimony of Energy Commission staff. A copy is being served on all persons identified on the proof of service list by noon today, and will be docketed no later than 5:00.

Not included in the testimony is a response to legal arguments raised by Southern California Edison Company (SCE), Pacific Gas and Electric Company, and San Diego Gas and Electric Company regarding the Energy Commission's authority to independently determine the confidentiality of records submitted to it that the California Public Utilities Commission (CPUC) has, according to the utilities, decided in its proceedings to withhold from the public. For example, SCE states that the Energy Commission "must follow California law which requires the protection of 'market-sensitive information' in accordance with procedures designed by the CPUC. . .". (Letter of Beth A. Fox to Scott W. Matthews, June 17, 2005, p. 5.) Because of the legal nature of the arguments, staff does not believe it appropriate to include a response in testimony and offers this statement of counsel instead. We will also be happy to explain our position at the August 24, 2005 hearing.

In the first place, we note that most confidentiality determinations at the CPUC are made by Administrative Law Judges, not the CPUC itself. Thus, it is not clear that the procedures referred to by the utilities are, in fact, CPUC procedures. More important is the fact that the Energy Commission cannot withhold information that it determines is not entitled to confidential treatment under the Public Records Act. (Gov. Code, § 6250 et seq.) The Commission is specifically directed to comply with the Public Records Act in its own statute (Pub. Resources Code, § 25223), and no provision in that law or in the Public Records Act limits the Commission's responsibility or discretion to make confidentiality determinations about the aggregated summary tables based on the information before it. While we agree that consistency between the Commission and the CPUC on this important issue is a desirable goal, we cannot recommend that the Commission withhold data when not justified by the Public Records Act merely because the CPUC might have reached a different conclusion

on the issue. (Conversely, if the CPUC has publicly released certain data, that data is no longer entitled to confidentiality protection by any agency.)

For example, the Commission may have a more detailed record on which to base its determination. Ignoring that record in the name of consistency would be incompatible with the requirement that an agency withholding information “justify its actions by demonstrating that the record is exempt under express provision of [the Public Records Act] or that on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.” (Gov. Code, § 6255.) Commission staff recommends that the Commission carefully consider the factual and legal issues before it in this proceeding in making a determination as to whether the three utilities have demonstrated that the aggregated summary tables are entitled to confidential treatment.

**Service List: Rebuttal Testimony for August 24, 2005 Commission Hearing on
IOU Appeals of Executive Director's Aggregation Proposal.**

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